

withdrawal of the "statutory double patenting" rejection is respectfully solicited.

The "same invention" in the context of Section 101 means identical subject matter<sup>1)</sup>. Accordingly, all embodiments covered by the patented claim must literally infringe the claim of the application and vice versa. Where either the patented claim or the claim of the application comprise an embodiment which does not literally infringe the other claim, identity is lacking and statutory double patenting does not exist<sup>2)</sup>.

Claims 1, 3 and 5 to 8 of **US 6,444,618** and Claims 1, 6, 11 and 16 do not define the "same invention" within the meaning of Section 101, as is immediately apparent when the requirements of Claim 1 of the patent and the requirements of applicants' Claim 1 are compared.

In accordance with Claim 1 of **US 6,444,618** it is required that the formulation *inter alia* comprises "at least one pesticidal crop protection active compound". In contrast thereto, applicants' Claim 1 requires the presence of<sup>3)</sup> "50 to 300 g/L of at least one azole derivative having a free hydroxy group or a salt or an adduct thereof". Accordingly, a formulation which comprises a pesticidal crop protection active compound different from the azole derivative referenced in applicants' Claim 1 infringes Claim 1 of **US 6,444,618** but does not infringe applicants' Claim 1.

The same applies where Claim 3 of **US 6,444,618** is concerned which merely specifies that the crop protection compound is a fungicide or herbicide. Claims 5 to 8 of **US 6,444,618** further specify co-constituents of the formulation without, however, limiting the crop protection agent to the particular azoles defined by applicants and/or the amount of the crop protection agent as required in accordance with applicants' Claim 1. Neither one of the referenced patented claims can therefore be deemed to define the "same invention" as defined by applicants' Claims 1, 6, 11 and 16. It is therefore respectfully requested that the rejection of Claims 1, 6, 11 and 16 under Section 101 be withdrawn. Favorable action is respectfully solicited.

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1) Miller v. Eagle Mfg. Co., 151 U.S. 186 (1984); In re Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970), and In re Ockert, 245 F.2d 467, 114 USPQ 330 (CCPA 1957).

2) Compare MPEP §804 II.A.

3) The respective requirement is incorporated into applicants' Claims 6, 11 and 16 by reference to Claim 1.

The Examiner has rejected Claims 2, 3, 7, 8, 15 and 17 under the judicially created doctrine of obviousness-type double patenting as being unpatentable in light of Claims 1, 3 and 5 to 8 of *US 6,444,618*.

Applicants herewith submit a terminal disclaimer disclaiming the terminal part of a patent granted this application which would extend beyond the expiration date of *US 6,444,618*, and agreeing that a patent granted this application shall be enforceable only for and during such period that the legal title of such patent is the same as the legal title to *6,444,618*. Withdrawal of the rejection under the judicially created doctrine of obviousness-type double patenting is therefore respectfully solicited.

In light of the foregoing and the attached, the application should now be in condition for allowance. Early action by the Examiner would be greatly appreciated.

REQUEST FOR EXTENSION OF TIME:

It is respectfully requested that a two month extension of time be granted in this case. A check for the \$420.00 fee is attached.

Please charge any shortage in fees due in connection with the filing of this paper, including Extension of Time fees, to Deposit Account No. 11.0345. Please credit any excess fees to such deposit account.

Respectfully submitted,

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Encl.: Terminal Disclaimer

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